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IN THE

SUPREME COURT OF THE UNITED STATES

No. 414

SONKEN-GALAMBA CORPORATION, a Corporation,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Respondent.

No. _____.

SONKEN-GALAMBA CORPORATION, a Corporation,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by Sonken-Galamba Corporation for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit ren-

dered in the above entitled causes (consolidated for all purposes in the courts below) which affirmed the judgment of the United States District Court for the District of Kansas.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (R. 3, App. A1)* is not yet officially reported. The cause originally being tried before a jury, no opinion was written by the district judge.

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was filed and entered on July 25, 1955 (R. 3). Petitioner's petition for rehearing was timely filed on August 15, 1955, and was denied by order entered August 24, 1955 (R. 21).

The jurisdiction of this Court is, accordingly, invoked by virtue of 28 U. S. C., Section 1254, paragraph (1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Whether the *commercially known and accepted designation* of a given commodity is an essential element or requirement in determining the appropriate railroad

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*Citations preceded by the letter "R" refer to the certified transcript of proceedings in the Court of Appeals for the Tenth Circuit. Citations preceded by the letters "Tr." refer to the certified copy of the transcript of the trial court proceedings. Citations preceded by the letters "App." refer to the appendix attached to this petition.

tariff classification (and, concomitantly, the appropriate tariff rate), to be applied to shipments of said commodity.

2. Whether commercial knowledge of a given commodity, *i. e.*, its commercially known and accepted designation, can be established by proof of how it is regarded by only one non-controlling segment of the industry dealing therein.

3. Whether, assuming a given commodity falls within the terms of two general tariff classifications, that classification must be applied which is most favorable to the shipper in order to resolve the ambiguity.

4. Whether one rule of tariff construction will be applied to foreign commerce, and another and different rule applied to domestic commerce.

5. Whether a railroad tariff classification of a given commodity must yield to a contrary and conflicting classification imposed by applicable federal governmental directives and orders.

GOVERNMENTAL REGULATIONS AND ORDERS INVOLVED.

Maximum Price Regulation 2, May 5, 1945 (Tr. 483-495) (App. A7).

National Production Authority, Dept. of Commerce, Order M-22, dated January 12, 1951 (Tr. 443-445) (App. A8); and subsequent amendments of March 1, 1951 (Tr. 447-449) (App. A9); September 11, 1951 (Tr. 451-453) (App. A10); and December 17, 1951 (Tr. 454-457) (App. A11).

Office of Price Stabilization, Ceiling Price Reg. 54, June 29, 1951 (Tr. 458-467) (App. A12), and Revision 1 thereto, January 16, 1952 (Tr. 468-481) (App. A14).

The pertinent text of the aforecited governmental regulations will be found in the Appendix hereto, and the regulations in their entirety, including the lengthy portions not pertinent hereto, will be found in the parts of the record above designated. There are no federal statutes directly applicable or pertinent hereto.

STATEMENT.

Sonken-Galamba Corporation, the appellant-defendant in the court below (hereinafter referred to as petitioner), is a scrap-dealer and secondary aluminum smelter operator engaged in the production of standard specification aluminum ingots in Kansas City, Kansas (Tr. 244). Plaintiff-appellee (hereinafter referred to as respondent) is a railroad company which is engaged in the transportation of freight, including scrap aluminum and aluminum ingots.

From November 16, 1949, to February 29, 1952, sixty-four carload shipments of aluminum material from wrecked or obsolete airplanes were transported by respondent, as delivering carrier, to petitioner as consignee (Tr. 5-9, 12-15).

The sole dispute between the parties in these two cases (which for all purposes were consolidated in the courts below) is which tariff freight rate is applicable to the shipments, that pertaining to aluminum ingots or that pertaining to aluminum scrap.

Specifically, respondent claims the material was aluminum ingots, pigs or slabs within the purview of the following tariff provision:

> "1570—Aluminum: Billets, blooms, ingots, pigs or slabs, see Notes 1 and 2, Items 1575 and 1576, loose (LCL, only if weighing 15 lbs. or over) or in packages.

"1575—Note 1—Ratings apply only on material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished, commercially known as billets, blooms, ingots, pigs or slabs."
(Tr. 55, 20, Ex. G, 407.)

Petitioner, on the other hand, claims that the material was aluminum scrap (thus subject to the lower tariff rate) within the purview of the following tariff provision:

"Scrap, aluminum (See Note 1).

"Note 1—includes only pieces (separate or combined) having value for remelting purposes only."
(Tr. 56, 20, Ex. G, 407.)

A statement of the historical and industrial background of this case, with its wide economic and legal implications, would seem in order.

The aluminum industry consists of three primary smelters and over fifteen recognized secondary smelters* (Tr. 245, 274). The term "primary," refers to ingots and other aluminum material produced directly from bauxite ore, while the term "secondary" refers to aluminum material, including ingots, produced from scrap aluminum (Tr. 245).

The secondary smelters, both in this country and elsewhere, came into their own, so to speak, after World War II (Tr. 275), when vast quantities of wrecked and obsolete military aircraft accumulated in western Europe (Tr. 214). These airplanes, constructed mostly of aluminum, soon became a major item of war surplus (Tr. 214, 188, 189).

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*The primary smelters, which are the giants of the industry, consist of Aluminum Company of America, Reynolds Metal Company and Kaiser Aluminum Chemical Company (Tr. 245, 247, 271).

In endeavoring to realize profitably from this accumulated surplus, the United States government sent experts abroad to consider the salvage problem (Tr. 213, 214). These planes, valuable for their scrap aluminum content only, presented a serious marketing problem because the fragments, such as wings and fuselages, could not be feasibly transported. Ocean-going vessels would not accept them for overseas transportation (Tr. 161), nor could they be economically transported by railroad carrier because said carriers had a minimum charge based on a given carload weight (Tr. 253, 254, 200). Since a full carload of these light but bulky airplane fragments would not weigh the minimum poundage, the shippers would thus be paying for pounds not shipped.

To overcome these problems, aluminum scrap dealers hit upon the idea of melting down these parts in the field, utilizing crude, improvised and movable furnaces. Using no metallurgically controlled process, the airplane fragments were chopped up and fed into the furnace by unskilled laborers. The molten mass, contaminated with dirt, dross and other foreign substances, was then poured into whatever container was available. Since the hardened mass could not meet any established standard of chemical composition, it had no value except to be remelted for the recovery of the base, elementary metal (Tr. 156-158, 171, 196-198, 201-224, 225, 238, 240, 241, 246-252, 255-258, 268, 300, 270-294, 163, 164, 172).

In this crude form, the material began to move overseas and over domestic common carriers. It was regarded then, and thereafter, as scrap and not as what was commercially known in the trade as ingots, pigs and slabs. The foreign railroads transported it as scrap (Tr. 174); the ocean carriers transported it as scrap (Tr. 161, 162); the United States Customs classified and admitted it as scrap

(Tr. 229-232). In fact, until shortly before the instant suits were filed, the railroads of this country carried it without question as scrap (Tr. 254, 255, 341, 342).

The widely recognized scrap nature of said material was in conformity with long recognized industrial understanding (Tr. 270-294, 211-244, 267-270, 156-198, 120, 244-267, 295-388). From the genesis of the aluminum industry almost sixty years ago and throughout the following years, the term aluminum ingot had a well-defined and generally accepted meaning in the industry dealing therein. Specifically, this meaning was that "ingot" embraced only material metallurgicaly processed to predetermined and established chemical specifications (Tr. 245-249, 282-286).

Industry understanding and practice notwithstanding, respondent brought suit against petitioner in the United States District Court for the District of Kansas, to recover the difference between the lower scrap rate which petitioner had actually paid, and the higher ingot rate. The jurisdiction of the trial court was invoked under the Acts of Congress relating to commerce, as set forth in Title 49 of the U. S. Code (Tr. 6).

A jury trial was held in the district court and, on June 3, 1953, a special verdict was rendered finding the material to be aluminum ingots, pigs or slabs, and not scrap aluminum (Tr. 20). Appropriate post trial motions were filed by petitioner (Tr. 18, 19, 21-26, 40-41), all of which were overruled by the district judge (Tr. 42-44) and, thereafter, petitioner appealed to the United States Court of Appeals for the Tenth Circuit (Tr. 45, 47 to 49).

In affirming the judgments of the trial court, the Court of Appeals found:

1. Commercial knowledge is not "an essential element or requirement" in determining the appropriate tariff classification of the material involved.*

2. Even if commercial knowledge is an essential requirement, the material was commercially recognized as aluminum ingot.

3. A directed verdict should have been entered for respondent at the close of the evidence and, therefore, petitioner's contention was moot that the jury was guilty of prejudicial misconduct in sending for and receiving a dictionary in order to ascertain therefrom the meaning of the words "ingots" and "combined."

The ruling of the Court of Appeals, as petitioner's ensuing argument will show, not only disregarded the long prevailing and universally accepted understanding of the aluminum industry but, in doing so, directly contravened the settled rulings of this Court relative to tariff construction as well as numerous governmental directives and regulations in force at the time of the shipments in question. Moreover, if the Court of Appeals decision is permitted to stand, tariffs pertaining to foreign commerce will, under applicable decisions of this Court, be subject to one test of construction, while, anomalously, tariffs pertaining to domestic commerce will be subject to a different and conflicting test.

The problems thus presented, along with the other questions considered *infra*, are not limited in their serious-

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*In so holding, the Court of Appeals was in direct conflict with the district court, which instructed the jury (Tr. 396): "An issue in these cases is whether the material here involved is what is 'commercially known as' aluminum ingots, pigs or slabs. If it is not so commercially known, the plaintiff cannot recover even if in some other meaning the material might be considered aluminum ingots, pigs or slabs."

ness to this petitioner. Whether the standards declared by this Court to be applicable to foreign commerce are also to be applied to domestic commerce, or whether we are to have two rules, one for identification of imports and the other for identification of domestic subjects of transportation, is obviously of great importance to all American industrial shippers. Particularly, the decision of this Court will be of wide concern to that class of shippers who, to date, have been actively engaged in purchasing both at home and abroad large quantities of war surplus materials from the United States government.

ARGUMENT.

I.

The Opinion of the United States Court of Appeals for the Tenth Circuit Is in Conflict with Applicable Decisions of the Supreme Court of the United States and Other Federal Appellate Courts Relative to the Proper Method of Identifying a Given Commodity for Railroad Tariff Classification Purposes.

The fundamental error of the ruling of the Court of Appeals lies in its conflict with settled legal rules of construction which this Court laid down more than fifty years ago. Even at a time when railroad freight carriage was in its relative infancy this Court realized that carrier and shipper alike must abide by certain practical, realistic and businesslike standards in determining the applicabilty of given tariff classifications for carriage rate purposes. These standards were disregarded by the Court of Appeals.

The fundamental issue presented is whether certain shipments of aluminum material fall within the ingot classification or scrap classification in respondent's pub-

lished tariff. The answer necessarily lies in a proper identification of the shipments in a manner which conforms with settled rules of construction established by previous decisions of this Court.

The Court of Appeals has held that the proper identification of the aluminum in question does not require an examination into its "commercially known" identity (R. 5, App. A4). The appellate court, in disregarding commercial knowledge as the test of identification, merely states that the words of the tariff "commercially known as—ingots, pigs or slabs" are nothing more than an "affirmation" that "ingots" processed "in the manner detailed in the schedule" *are* known as ingots, pigs, or slabs and, therefore, the tariff "does not prescribe or fix commercial knowledge as an essential element or requirement to bring the commodity within the scope and purview of the schedule" (R. 5, App. A4). Not a single case is cited by the Court of Appeals in support of its holding, except a 1931 Louisiana state court case "dealing with an analogous problem"* (R. 6, App. A4).

In thus ruling, the appellate court below has ignored the directly contrary ruling of this Court in *Sonn et al.* v. *Magone,* 159 U. S. 417, 16 S. Ct. 67, 40 L. Ed. 203, wherein Chief Justice Fuller stated:

> "* * * the court told the jury that 'commercial designation of the article, or what the article is called in trade or commerce * * * has nothing to do with the question.' We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning of the tariff law."

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*Yazoo & M. V. R. Co. v. A. Marx & Sons, 17 La. App. 172, 135 So. 64.

The language used by this Court in the *Sonn* case, *supra*, leaves no doubt as to the yardstick that must be used in determining the identity of a commodity for tariff classification purposes. The rule, expressed by Chief Justice Fuller, had earlier been recognized in *Maddock* v. *Magone*, 152 U. S. 368, 14 S. Ct. 588, 38 L. Ed. 482, wherein it was similarly held by this Court that commercial knowledge or usage of a term will be used in construing a tariff act, and will prevail over other significations of the word, providing the commercial designation is the result of established usage in commerce and trade and is definite, uniform and generally accepted in the industry. Such principles were not a new or revolutionary concept in American jurisprudence.

Commercial knowledge has been recognized as the decisive factor in determining the identity or denomination of a given commodity from the earliest reported cases of this Court. *Two Hundred Chests of Tea*, 9 Wheaton 430, 22 U. S. 430, 6 L. Ed. 128; *Curtis* v. *Martin*, 3 How. 106, 44 U. S. 106, 11 L. Ed. 516; *Amer. Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 12 S. Ct. 55, 35 L. Ed. 821; *Arthur* v. *Morrison*, 96 U. S. 108, 24 L. Ed. 764; *Chew Hing Lung & Co.* v. *Wise*, 176 U. S. 156, 20 S. Ct. 320, 44 L. Ed. 412. Cf. *Cadwalader* v. *Zeh*, 151 U. S. 171, 176, 38 L. Ed. 115, 14 S. Ct. 288, wherein it was held:

> "It has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no com-

mercial meaning is called for or proved, that the common meaning of the words is to be adopted."

Of course, the rationale underlying the many opinions of this Court, and totally overlooked by the Court of Appeals in its opinion, is apparent. Tariffs, as in the case of every form of commercial relationship, must depend upon the mutual understanding of practically-minded business men. This is the essence not only of any strong national economy but, as well, of the daily and continuing social and commercial intercourse which constitutes a healthy economic system.

But confining ourselves to railroad freight carriage the commercial understanding of the shipper or, in this instance, of a class of shippers, is no less essential. In holding that commercial knowledge of a commodity is of vital importance in properly construing a railroad tariff classification the Court of Appeals for the 8th Circuit has realistically held, *Union Wire Rope Corp.* v. *A. T. & S. F. Ry. Co.*, (C. C. A. 8, 1933) 66 F. 2d 965, 967:

> "Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. * * * The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed. If the tariff is addressed to a special class of shippers and uses words which have a particular or customary import among such class of shippers, that meaning should be given to such words, for that is how they reasonably would understand them."

In further explaining the necessity for such an approach the court went on to say, l. c. 967:

> "For example, if a tariff provided a lower rate upon 'culls' in apple shipments, that word must find its

definition in what apple shippers honestly regard and treat as 'culls.' When the carrier addresses a word to a class, it must abide by the established or customary meaning of that word in that class. This rule works out justice. Always the carrier can avoid such words or it can make clear the meaning it intends them to have. On the other hand, the shipper would naturally and reasonably understand the words in their customary meaning, and to hold him to something else after he had become obligated through reliance thereon would result in deception and loss caused by the carrier to its advantage."

The ruling of the Court of Appeals for the Tenth Circuit in the instant case is not only manifestly contrary to and in conflict with the many decisions just cited, but is all the more perplexing because it is contrary to the earlier decision of the Tenth Circuit itself, in *Sonken-Galamba Corp.* v. *Union Pac. R. Co.*, 145 F. 2d 808, wherein the *Sonn* case and *Union Wire Rope Corp.* case, *supra*, were cited with obvious approval.

It is the respectful contention of petitioner that in view of the conflict in basic legal principles of tariff classification and construction resulting from the opinion of the Tenth Circuit in this case, that certiorari should be granted. The conflict is of great importance to all industrial shippers, and should be resolved.

II.

In Holding That the Shipments Involved Were Nevertheless "Commercially Known" as Ingots (Though the Court Disclaims That Such a Test Is Proper), the Court of Appeals Is in Conflict with the Following Settled Rules of This Court and Other Circuits That: (1) What a Commodity Is Regarded As by One Segment of an Industry Is Insufficient to Establish Its Commercially Known Identity; and (2) When a Commodity Falls Within the Terms of Two General Tariff Classifications, the One Subject to the Lower Rate Must Be Applied Since the Ambiguity Thereby Created Must Be Resolved in Favor of the Shipper.

(1)

The Court of Appeals held that the material here involved was nevertheless "commercially known" as ingot, even if the test of commercial knowledge is applied. The sole testimony as to the "ingot" character of the shipments was that one minor segment of the aluminum industry (*i. e.*, those engaged in buying and selling scrap for the recovery of the base metal) occasionally so considered it. At the trial, respondent's sole witness as to the nature of the commodity was a freight inspector who, by his own testimony (Tr. 145), conceded that he did not take into account Note 1 of the aluminum ingot tariff in classifying the material.* Petitioner, however, introduced five wit-

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*It is Note 1 quoted *supra* in petitioner's statement of the case, that expressly lays down the test of "commercial knowledge" in determining what is an ingot, pig or slab, even aside from the controlling legal principles discussed in this petition. Accordingly, if commercial knowledge is disregarded as the appropriate test in determining the applicability of Sec. 1570 of the tariff, the definitive note is obviously left meaningless in its en-

nesses, all highly trained in metallurgy who, without exception, testified that the material involved was commercially known throughout the aluminum industry as scrap; only one minor segment, engaged in buying and selling scrap for the recovery of the base metal, occasionally referred to such material *qualifiedly* as "scrap ingot" (Tr. 270-294, 211-244, 267-270, 156-198, 198-210, 244-267, 295-388). Petitioner's witnesses included representatives of producer-sellers, foreign and domestic, smelter-users, and competent, disinterested authorities representative of the entire aluminum industry. All testified as to the commercially known scrap nature of the shipments in question.

We make brief reference to the above witnesses because the Court of Appeals, in holding the material to be "commercially known" as ingots, relied entirely on testimony pertaining to only one segment of the world-wide aluminum industry. Accordingly, the opinion must be deemed in conflict with the established rule of this Court as well as other federal courts, that what a commodity is regarded as by one segment of an industry is not sufficient to determine its recognized commercial identity.

In *Sonn et al.* v. *Magone, supra,* l. c. 421, it was clearly held the "commercial knowledge" of a commodity is to be

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tirety. This is particularly significant since it has been held that a cardinal rule of tariff construction is that all pertinent parts and provisions must be taken into consideration and each given effect. *Burrus Mill & Elevator Co.* v. *Chicago, R. I. & P. R. Co.,* (C. C. A. 10) 131 F. 2d 532. As stated in *United States* v. *Missouri-Kansas-Texas R. Co.,* (C. A. 5) 194 F. 2d 777, 778: "The construction of a printed railroad tariff presents a question of law and does not differ in character from that presented when the construction of any other document is in dispute. The four corners of the instrument must be visualized and all the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence therein contained."

determined from established usage in commerce and trade which is "definite, uniform and general," and not from "partial, local or personal" usage of the term in question. See also, *Maddock* v. *Magone,* 152 U. S. 368, 14 S. Ct. 588, 38 L. Ed. 482; *Berbecker* v. *Robertson,* 152 U. S. 373, 14 S. Ct. 590, 38 L. Ed. 484. Since knowledge of a commodity by only one non-controlling segment of the industry is obviously "partial, local, or personal" as distinguished from "definite, uniform and general," it appears that the Court of Appeals used the wrong criterion in determining "commercial knowledge" in this case. In so doing, the court is in conflict not only with applicable decisions of this Court, but also with its own previous ruling in *Sonken-Galamba Corp.* v. *Union Pac. R. Co.,* (C. C. A. 10) 145 F. 2d 808, wherein it was held, l. c. 812:

> "* * * it is competent, we think, to consider whether in the light of the nature of the whole mass of the material, and the general use or uses to which it is put, a particular market for a given shipment constitutes a recognized commercial value or is merely isolated and sporadic in the sense that it should be ignored in the practical application of the facts to the definition."

(2)

Assuming that the shipments did fall within the ingot classification of respondent's tariff, the Court of Appeals' decision still conflicts with applicable decisions of this Court since, as the evidence in the case showed, the material concededly had "value for remelting purposes only." In the very words of the Court of Appeals (R. 3-A, App. A2):

> "* * * the material did not conform to any established commercial specification or any standard composition and was contaminated with dirt and foreign metals, rendering it unfit for forging, rolling or mak-

ing of any finished aluminum articles, and having value for remelting purposes only to recover the elementary, base metals, and was generally only used by aluminum smelters as part of the material to make aluminum ingots of specified commercial standards."

In so holding, the court below overlooked the fact that the material thus characterized fell exactly within the scrap tariff provision, viz., "Scrap aluminum (see Note 1). Note 1—includes only pieces (separate or combined) having value for remelting purposes only" (Tr. 56, 20, Ex. G 407).

Since the Court of Appeals' own description of the material places it within the scrap as well as the ingot tariff classification, the scrap classification must be applied as a matter of law. The ingot and scrap provisions both being general, not specific, in nature, it is settled that when a commodity falls within the terms of two general tariff provisions, the one subject to the lower tariff rate (in this instance scrap) will be applied on the ground that such an ambiguity must be resolved in favor of the shipper and against the carrier; stated otherwise, where two designations are equally appropriate, shippers are entitled to have applied the one specifying the lower rate. This principle was announced by this Court in *United States* v. *Gulf Refining Co.*, 268 U. S. 542, 45 S. Ct. 597, 69 L. Ed. 1082. As cogently expressed by the Fifth Circuit in *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, (C. C. A. 5) 57 F. 2d 654, 655:

"Tariffs, like statutes, have the force of law; like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. *Swift* v. *U. S.*, (C. C. A.) 255 Fed. 291. They may not be contrived in catch-penny words to catch the ignorant or unwary. If they are ambiguous, or permit of two

meanings, the shipper may construe them in the most favorable way to himself which the terms permit."

And as stated in *Boone* v. *United States,* (C. C. A. 6) 109 F. 2d 560, 562:

> "Where more than one tariff may be applicable to the same transportation service, all must be considered together, and conflicts avoided where possible, it being presumed that the carrier and regulatory commission did not intend to confuse that which should be plain and if more than one tariff is applicable to the same shipment, the lowest will prevail."

The principles cited have been announced in numerous cases. *Sonken-Galamba Corp.* v. *Union Pac. R. Co.,* (C. C. A. 10) 145 F. 2d 808; *Christensen* v. *Northern Pac. Ry. Co.,* (C. A. 8) 184 F. 2d 534; *United States* v. *Missouri-Kansas-Texas R. Co.,* (C. A. 5) 194 F. 2d 777. See also, *Louisville & N. R. Co.* v. *United States,* (D. C. Ky.) 109 F. Supp. 464, where the court there cited this Court's decision in *U. S.* v. *Gulf Refining Co., supra,* in support of the proposition that where two classifications appear to be equally applicable, the shipper is entitled to the lower classification.

The instant opinion of the Court of Appeals, being thus in conflict with the previous announcements of this Court and other federal appellate tribunals, should be reversed on certiorari, in conformity with accepted rules of tariff construction.

III.

If Permitted to Stand, the Decision of the Court of Appeals Would Result in Domestic Commerce Being Subject to One Rule of Tariff Construction, While Foreign Commerce Would Be Subject to Another and Different Rule.

Since the opinion of the court below is clearly in conflict in principle with the aforecited decisions of this Court

and other federal circuits, thereby leaving all industrial shippers in a state of uncertainty as to what rule of tariff construction will be capriciously applied by the carriers in any given case, there would seem ample compelling reason that, on certiorari, such conflict be resolved.

However, it will be noted that the cases of *Cadwalader* v. *Zeh*, *Sonn et al.* v. *Magone*, and *Maddock* v. *Magone*, *supra*, when examined in the light of their own peculiar facts, dealt with the subject of tariff construction relative to the importation of foreign commodities. In principle, the same test of "commercial knowledge" expressed in those decisions should be applicable to domestic railroad tariff construction in the instant case. Regardless of whether a given shipper is dealing with an imported or domestic commodity the test of commodity identification would, in either event, be the same. As stated in *Union Wire Rope Corp.* v. *A., T. & S. F. Ry. Co.*, *supra*, l. c. 967:

> "When the carrier addresses a word to a class, it must abide by the established or customary meaning of that word in that class. This rule works out justice. * * * the shipper would naturally and reasonably understand the words in their customary meaning, and to hold him to something else after he had become obligated through reliance thereon would result in deception and loss caused by the carrier to its advantage."

Unquestionably, this same fundamental rule of reason and fairness must have prompted this Court in the *Cadawalder*, *Maddock* and *Sonn* cases, *supra*, to apply commercial knowledge as the test of commodity identification in the field of foreign commerce.

It is difficult to conceive, therefore, that a rule of fairness should be applied to the importation and identification of foreign commodities, while a different and manifestly inequitable rule should be applied to domestic trans-

portation. If the opinion below is permitted to stand, and its holding gains in momentum in future cases, assuredly that would be the consequence.

Aside, however, from the advisability or inadvisability of different standards in the respective fields of domestic and foreign commerce, a clarifying and definitive ruling by this Court, in view of its previous expressions in *Cadwalader* v. *Zeh, Sonn et al.* v. *Magone* and *Maddock* v. *Magone, supra,* would seem of great importance to all industrial shippers.

IV.

The Opinion of the Appellate Court Below Is in Conflict with Applicable Federal Governmental Directives and Orders Which Classified the Material As Scrap.

During and subsequent to World War II various governmental war and emergency directives and orders, some of which were in effect at some of the dates of the shipments involved, classified the material as scrap. Not only would it seem that these directives further corroborated the commercially known identity of the shipments as scrap, but, as well, they in effect would have prohibited commerce in the material as anything else.

Sec. 14 of Maximum Price Regulation 2, May 5, 1945 (Tr. 483-495, App. A7), is titled "Maximum prices for aluminum scrap." Note 5 to this section (Tr. 489, App. A7) is entitled "Wrecked aircraft" and reads in part:

> "The maximum prices established for wrecked aircraft (prepared) are for the actual aluminum alloy content of the ingot, or similar shape, recovered by the buyer's first melt of the entire shipment."

Clearly, this regulation classified material identical to that involved here as scrap, notwithstanding the fact

that said scrap may have been in ingot form. Mere form alone was thus rejected as the determining factor of commercial classification for price purposes.

Similarly, but more specifically, National Production Authority, Department of Commerce, Order M-22, dated January 12, 1951 (Tr. 443-445, App. A8), states in its first paragraph that it was promulgated after consultation with industry representatives. In Par. 26.52(b), it states:

> " 'Aluminum scrap' means all materials or objects which are the waste or by-product of industrial fabrication, or which have been discarded on account of obsolescence, failure or other reason, the principal ingredient of which by either weight or volume is metallic aluminum either of domestic generation or imported in either loose or pig form, * * *"

Again, the material we are dealing with in the instant case falls squarely within this governmental classification. To the same effect, NPA Order M-22, as amended March 1, 1951 (Tr. 447-449, App. A9). NPA Order M-22, as amended September 11, 1951 (Tr. 451-453, App. A10), adds a further distinguishing definition of ingot, which incidentally, conforms with the commercial knowledge of the term. As stated in Sec. 2(j) (Tr. 450, App. A11):

> " 'Ingot' means aluminum as cast to specific composition for remelting."

As the Court of Appeals below concedes in its opinion, the instant shipments were not cast to specific composition, and, accordingly, the material clearly would not fall within the meaning of Sec. 2(j) of Order M-22 as amended. Order M-22 was further amended on December 17, 1951 (Tr. 454-457, App. A11), again defining ingot as aluminum cast to specific composition and, in addition, defines the term reclaimer in Sec. 2(e) (Tr. 454, App. A12) in the following language:

> " 'Reclaimer' means any person who reclaims aluminum from scrap contaminated with extraneous materials in a furnace, crucible, or sweater operation. A 'reclaimer' produces only unrefined metal which is not alloyed to a given specification or which is not otherwise properly controlled or refined and which is sold as scrap pig to a producer or a smelter."

Here, too, is a reference to scrap, in the commercial sense of the word, which embraces the same type of material described by the very words of the court's opinion below.

Office of Price Stabilization, Ceiling Price Reg. 54, dated June 29, 1951 (Tr. 458-467, App. A12), provides in Sec. 8(r) (Tr. 467, App. A13):

> " 'Scrap' or 'scrap material' means aluminum scrap which is the waste or by-product of any kind of metal working or processing, or which has been discarded on account of obsolescence, failure or other reason. It also includes sweated pig or ingot."

By the above provision not only is material such as is here involved classified as scrap but, by Revision 1 to said regulation, dated January 16, 1952 (Tr. 468-481, App. A14), it is made clear (Tr. 471, App. A14) that so-called "sweated pig or ingot," which is classified as scrap, cannot be considered commercial aluminum ingot (or "secondary aluminum ingot," as the term is used in the industry) because its production is not by a metallurgically controlled process—an indispensable requirement for commercial aluminum ingot. This point is reiterated in the regulation under Sec. 17(t) (Tr. 481, App. A15), which defines the term "secondary aluminum ingot."

Even a cursory glance at the above directives and orders will show the respective governmental classifications of ingot and scrap and confirm the commercial knowledge of those terms, ignored by the appellate court below.

Since these directives and orders have the force of law, the opinion of the Court of Appeals herein must yield as being in conflict with said directives.

A number of Interstate Commerce Commission cases will be found dealing with the classification of aluminum material. Some of these cases correctly found commercially recognized "ingots" to be involved. See, *Federated Metals Corp.* v. *St. L. & S. F. Ry. Co.*, 171 I. C. C. 78; *Samuel Greenfield Co., Inc.*, v. *N. Y. Cent. Rd. Co.*, 288 I. C. C. 59. Other I. C. C. cases have neglected to apply commercial knowledge as the test in determining the identity of given aluminum material, relying instead on generalities and dictionary or lay terminology. *Esperado Mining Co.* v. *A., T. & S. F. Ry. Co.*, 278 I. C. C. 183; *Apex Smelting Co.* v. *N. Y. Cent. Rd. Co.*, 288 I. C. C. 78; *American Smelting & Ref. Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383. Such latter I. C. C. cases have lost sight of the distinctions announced in earlier I. C. C. decisions and are in conflict with those rules of tariff construction announced by this Court, and other federal courts, and also with the many governmental directives mentioned herein. Fortunately, such I. C. C. rulings are not binding on the courts. *Brown & Sons Lbr. Co.* v. *L. & N. R. Co.*, 299 U. S. 393, 81 L. Ed. 301, 57 S. Ct. 265; *Hohenberg* v. *L. & N. R. R. Co.*, 46 F. 2d 952 (C. C. A. 5); 15 C. J. S., Commerce, Sec. 145, p. 537.

CONCLUSION.

The conflict of the instant decision of the Court of Appeals for the Tenth Circuit with applicable decisions of this Court and of other courts of appeal for other circuits, as well as with applicable federal directives and orders having the weight of law, would seem to amply demonstrate not only the error committed by the court below but

also the need for Supreme Court review on certiorari in order to resolve a fundamental variance of legal approach to tariff construction. Only by such a determination could industrial shippers be invested with a yardstick, judicially recognized in all federal courts, sufficient to enable them to ascertain and predict with understanding the tariff rates they will be required to pay on their respective commodities.

Moreover, as petitioner has pointed out, if the instant decision is permitted to stand, tariffs relating to foreign commerce will be subject to one rule of construction while railroad tariffs relating to domestic commerce will be subject to another and different rule. Such a result would serve only to confuse and deceive all industrial shippers and might seriously impair, to the detriment of the United States, the future sale by the Government of war surplus commodities both at home and abroad. This would certainly be true in the case of aircraft scrap aluminum.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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APPENDIX A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May Term—1955

Number 5016-7.

SONKEN-GALAMBA CORPORATION, a Corporation, Appellant,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS

Filed United States Court of Appeals, Tenth Circuit, July 25, 1955. Robert B. Cartwright, Clerk.

Harry L. Jacobs and N. E. Snyder (Robert J. Coleman was with them on the brief) for Appellant.

Ralph M. Hope (W. F. Lilleston and Williard L. Phllips were with him on the brief) for Appellee.

Before Bratton and Murrah, Circuit Judges, and Wallace, District Judge.

Wallace, District Judge:

These two actions,[1] consolidated for trial, were instituted by appellee, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (herein referred to as

[1]Nos. W-245 and KC-261 in the district court.

Trustee), to recover for the difference between certain freight rates actually paid by the appellant, Sonken-Galamba Corporation, a corporation (herein referred to as Shipper), and the rates allegedly applicable for shipments over Trustee's railroad and connecting railroad. From adverse verdicts and judgments the Shipper appeals.

Concededly, there is no substantial conflict in the pertinent facts. The shipped material consisted of pieces of wrecked or obsolete aluminum airplane parts which were procured from various places in the United States and Europe and which were melted down into masses or lumps in shapes roughly resembling ingots, pigs or slabs. These pieces of aluminum scrap were melted in the field in crude furnaces operated by unskilled labor and the process was in no way metallurgically controlled. After such melting the material did not conform to any established commercial specification or any standard chemical composition and was contaminated with dirt and foreign metals, rendering it unfit for forging, rolling or making of any finished aluminum articles, and having value for remelting purposes only to recover the elementary, base metals, and was generally only used by aluminum smelters as part of the material to make aluminum ingots of specified commercial standards.

The single issue is whether for freight tariff purposes the shipped material should be deemed "scrap aluminum,"[2]

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[2]The aluminum ingot, pig and slab classification in the tariff provides: "1570—Aluminum: Billets, blooms, ingots, pigs or slabs. See Notes 1 and 2, Items 1575 and 1576, loose (LCL, only if weighing each 15 lbs. or over) or in packages." 1575—Note 1 states: "Ratings apply only on material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished, commercially known as billets, blooms, ingots, pigs or slabs."

or whether such material should take the higher rate applicable to "aluminum ingots, pigs or slabs."[3]

The shipper urges that the instant shipments cannot be deemed to fall under the higher tariff provided for "aluminum ingots, pigs or slabs" inasmuch as the express wording of such provision requires that in order to be classified thereunder the aluminum material must unqualifiedly be "commercially known as * * * ingots, pigs or slabs," as distinguished from aluminum material that might be qualifiedly or in a loose trade sense be referred to as ingots, pigs or slabs merely because they physically resemble commercial ingot, pig or slab. In this regard the Shipper argues that aluminum *commercially* known as ingots, pigs or slabs has reference only to aluminum ingots, etc., suitable for forging, rolling, casting, etc., to make useful aluminum articles, produced by metallurgically controlled processes, of chemical composition complying with established standards and specifications, identified by appropriate nomenclature, of uniform content and forms and free from contamination; and, does not refer to these contaminated masses of aluminum having value only for remelting for the recovery of the base metal content.

Two separate and independent reasons exist why appellant Shipper's appeal must fail.

First, it is a strained construction to insist that the descriptive clause of the freight tariff provision "commercially known as billets, blooms, ingots * * *" is a clause of limitation and that as such only applies to ingots which as

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[3]The aluminum scrap classification in the tariff reads: "Scrap, aluminum (see Note 1)." Note 1 provides: "includes only pieces (separate or combined) having value for remelting purposes only."

a matter of chemical content can immediately be used in finished aluminum products without further smelting. By its express terms, the tariff schedule applies to ingots, pigs, or slabs weighing 15 pounds or more, not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished. Any commodity meeting such specifications comes within the schedule. The words "commercially known as * * * ingots, pigs, or slabs" as they appear in the context of the schedule are merely an affirmation that ingots, pigs, or slabs of the size and processed in the manner detailed in the schedule are commercially known as ingots, pigs, or slabs. It does not prescribe or fix commercial knowledge as an essential element or requirement to bring the commodity within the scope and purview of the schedule.[4]

Secondly, even if the tariff provision in question be interpreted as requiring all goods within its purview to be "commercially known as" ingot, pig or slab, the evidence of record is overwhelming that the goods in controversy were in common business terminology so regarded. Although the aluminum in question was not of the purity

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[4]Cf. *Yazoo & M. V. R. Co.* v. *A. Marx & Sons*, 17 La. App. 172, 135 So. 64, 65 (1931), where the Louisiana court in dealing with an analogous problem as to whether certain goods were "pig-lead" or "scrap-lead" remarked: "The making up of freight tariffs is a highly practical matter, for they are to be used and applied by merchants and railroaders, generally the most practical of men. There is more than ordinary need to give the language of a tariff its obvious meaning, and to avoid refinements of construction which would require technical knowledge to understand and apply it. The average man has no difficulty in distinguishing between pig-lead and scrap-lead by sight. If classification for rating depends on origin, whether directly from the ore or from junk, the rate man must stop to take and consider evidence, and it may be, to make physical and chemical investigations. It is not reasonable to suppose that for the application of freight tariffs aids of those sorts should be required."

and general quality to be readily usable for finished aluminum products without further smelting and was inferior to ingots treated by control smelting, such does not alter the fact that the shipped goods in their melted down form, were commercially regarded and referred to as ingots, pigs or slabs, as distinguished from "Scrap, Aluminum."[5]

Although there have been no prior court rulings dealing with this exact problem, a number of Interstate Commerce Commission decisions have rejected arguments of the type posed by the Shipper that due to the origin and value of the shipments in question, the goods should be classified as "Scrap, aluminum" even though melted into "ingot" form.[6] These I. C. C. decisions, although not

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[5]Although the Shipper introduced expert testimony that in technical commercial aluminum parlance goods of the character in question were deemed "scrap" as distinguished from "ingots, pigs or slabs," the evidence in its entirety demonstrates beyond question that as a practical matter these shipments were commercially treated, designated, named and considered by all parties handling them, including the Shipper itself, as ingots, pigs and slabs. Such evidence includes bills of lading, correspondence, invoices, contracts and sales confirmations. Parenthetically, it is well to note that the instant problem involving freight transportation must be distinguished from the one encountered by the Commissioner of the United States Customs wherein he had to determine whether the merchandise should be entered as scrap aluminum, free of duty, or dutiable *crude* aluminum.

[6]See *Esperado Mining Co.* v. *Atchison, T. & S. F. Ry. Co.*, 278 I. C. C. 183; *Samuel Greenfield Co., Inc.*, v. *New York Central R. Co.*, 288 I. C. C. 59; *Apex Smelting Co.* v. *New York Central R. Co.*, 288 I. C. C. 78; *American Smelting & Refining Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383. And, as mentioned in *Brown & Brown* v. *B. & M. R. R.*, 266 I. C. C. 310, 312: "The Commission consistently has found that it is the character of an article from a transportation standpoint, and not the use to which it shall be put, that determines the rate or rating applicable."

binding on this Court, certainly are persuasive;[7] and, even though some slight factual distinctions exist between such decisions and the case at bar, insofar as the basic rationale is concerned the distinctions are without legal significance.

Although the appellant urges error in connection with the manner in which the jury arrived at a verdict for the Trustee,[8] this asserted error will not be discussed inasmuch as these cases should never have gone to the jury. The determinative issue in both of the instant suits was one of law which should have been passed on by the court.

Inasmuch as the trial court entered judgments for the Trustee,[9] and since such results are correct as a matter of law, the judgments of the trial court are hereby Affirmed.

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[7]Read *Empire Refining Co.* v. *David,* 6 F. 2d 305 (D. C. Okla., 1925). As observed in *Updike Grain Corporation* v. *St. Louis & S. F. Ry. Co.*, 52 F. 2d 94, 96 (C. A. 8, 1931): "While the decisions of the Interstate Commerce Commission are not conclusive here, they are of great weight. They are especially persuasive in this highly technical field of rate construction and rate interpretation."

[8]Appellant urges that the jury was guilty of prejudicial misconduct in sending for a dictionary; in receiving a dictionary and in ascertaining therefrom the meaning of the words "ingots" and "combined."

[9]Judgments were entered based upon the special verdict rendered by the jury (in both cases) finding that the materials in question fell within the "aluminum ingot, pig and slab" classification; and, not within the "Scrap, aluminum" section.

APPENDIX B.

Maximum Price Regulation 2, May 5, 1945

ALUMINUM SCRAP AND SECONDARY
ALUMINUM INGOT

* * *

Such specifications and standards as are used in this regulation were, prior to such use, in general use in the trade or industry affected or have previously been promulgated and their use lawfully required by another Government agency.

* * *

Sec. 13. (2) *"Aluminum scrap"* includes all aluminum and aluminum alloy materials which are the waste or by-product of any kind of metal working. It also includes any materials which have been discarded from inventory or use because of obsolescence, failure or other reasons and which are to be remelted for further use.

* * *

(8) "Wrecked aircraft, prepared," is aluminum scrap (not including engines or engine parts) recovered from wreckage of aircraft after all possible non-aluminum parts have been removed and the aluminum cut or sheared into pieces not larger than 24" x 24" x 60". "Wrecked aircraft, unprepared," is the wreckage of aircraft which does not meet the definition for "wrecked aircraft, prepared."

* * *

Sec. 14. Note 5. *Wrecked aircraft.* The maximum prices established for wrecked aircraft (prepared) are for the actual aluminum alloy content of the ingot, or similar shape, recovered by the buyer's first melt of the entire shipment.

National Production Authority, Dept. of Commerce, Order M-22, Jan. 12, 1951

Chapter I—National Production Authority, Department of Commerce

PART 26—ALUMINUM

SUBPART C—DISTRIBUTION OF ALUMINUM SCRAP

This order is found necessary and appropriate to promote the national defense and is issued pursuant to the Defense Production Act of 1950. In the formulation of this order, there has been consultation with industry representatives, including trade association representatives, and consideration has been given to their recommendations. However, consultation with representatives of all trades and industries affected in advance of the issuance of this order has been rendered impracticable due to the necessity for immediate action, and because the order affects a large number of different trades and industries.

* * *

§26.52 *Definitions.* As used in this subpart:

(b) "Aluminum scrap" means all materials or objects which are the waste or by-product of industrial fabrication, or which have been discarded on account of obsolescence, failure or other reason, the principal ingredient of which by either weight or volume is metallic aluminum either of domestic generation or imported in either loose or pig form, and shall include all types and grades of aluminum residues, such as drosses, skimmings, fines, grindings, sawings and buffings: *Provided, however,* That the recoverable metallic aluminum content, as determined by fire assay, hydrogen evolution or other method of comparable efficiency, constitutes 50 percent or more by weight of such residues.

* * *

National Production Authority, Dept. of Commerce, Order M-22, As Amended March 1, 1951

Chapter VI—National Production Authority, Department of Commerce

M-22—ALUMINUM

DISTRIBUTION OF ALUMINUM SCRAP

This amendment to NPA Order M-22 is found necessary and appropriate to promote the national defense and is issued pursuant to the Defense Production Act of 1950. In the formulation of this order, there has been consultation with industry representatives, including trade association representatives, and consideration has been given to their recommendations. However, consultation with representatives of all trades and industries affected in advance of the issuance of this order has been rendered impracticable due to the necessity for immediate action and because the order affects a large number of different trades and industries.

Sec. 2. *Definitions.* As used in this order:

* * *

(b) "Aluminum scrap" means all materials or objects which are the waste or by-product of industrial fabrication, or which have been discarded on account of obsolescence, failure or other reason, the principal ingredient of which by either weight or volume is metallic aluminum either of domestic generation or imported in either loose or pig form, and shall include all types and grades of aluminum residues, such as drosses, skimmings, fines, grindings, sawings and buffings: *Provided, however,* That the recoverable metallic aluminum content, as determined by fire assay, hydrogen evolution or other method of comparable efficiency, constitutes 50 percent or more by weight of such residues.

* * *

National Production Authority, Dept. of Commerce, Order M-22, As Amended September 11, 1951

M-22—DISTRIBUTION AND USE OF ALUMINUM SCRAP

This amendment to NPA Order M-22 is found necessary and appropriate to promote the national defense and is issued pursuant to the Defense Production Act of 1950 as amended. In the formulation of this order as amended, there has been consultation with industry representatives, including trade association representatives, and consideration has been given to their recommendations. However, consultation with representatives of all trades and industries affected in advance of the issuance of this order has been rendered impracticable due to the necessity for immediate action and because the order affects a large number of different trades and industries.

* * *

Sec. 2. *Definitions.* As used in this order:

* * *

(b) "Aluminum scrap" means all materials or objects which are the waste or by-product of industrial fabrication, or which have been discarded on account of obsolescence, failure, or other reason, the principal ingredient of which by either weight or volume is metallic aluminum, or from which metallic aluminum may be recovered by sweating, either of domestic generation or imported in either loose or scrap pig form, and shall include all types and grades of aluminum residues, such as drosses, skimmings, fines, grindings, sawings, and buffings.

* * *

(e) "Reclaimer" means any person who reclaims aluminum from scrap contaminated with extraneous materials in a furnace, crucible, or sweater operation. A "reclaimer" produces only unrefined metal which is not alloyed to a given specification or which is not otherwise properly con-

trolled or refined, and which is sold as reclaimed scrap pig to a producer or a smelter.

* * *

(j) "Ingot" means aluminum as cast to specific composition for remelting.

(k) "Pig" means aluminum of variable composition as produced in an electric reduction furnace.

(l) "Scrap pig" means unrefined aluminum of variable composition as produced in a reclamation operation.

* * *

National Production Authority, Dept. of Commerce, Order M-22, As Amended December 17, 1951

Chapter VI—National Production Authority, Department of Commerce

M-22—DISTRIBUTION AND USE OF ALUMINUM SCRAP

This amendment to NPA Order M-22 as amended September 11, 1951, is found necessary and appropriate to promote the national defense and is issued pursuant to the Defense Production Act of 1950 as amended. In the formulation of this order as amended, there has been consultation with industry representatives, including trade association representatives, and consideration has been given to their recommendations. However, consultation with representatives of all trades and industries affected in advance of the issuance of this amended order has been rendered impracticable due to the necessity for immediate action and because the order affects a large number of different trades and industries.

* * *

SEC. 2. *Definitions.* As used in this order:

* * *

(b) "Aluminum scrap" means all materials or objects which are the waste or by-product of industrial fabrica-

tion, or which have been discarded on account of obsolescence, failure, or other reason, the principal ingredient of which by either weight or volume is metallic aluminum, or from which metallic aluminum may be recovered by sweating, either of domestic generation or imported in either loose or scrap pig form, and shall include all types and grades of aluminum residues, such as drosses, skimmings, fines, grindings, sawings, and buffings.

* * *

(e) "Reclaimer" means any person who reclaims aluminum from scrap contaminated with extraneous materials in a furnace, crucible, or sweater operation. A "reclaimer" produces only unrefined metal which is not alloyed to a given specification or which is not otherwise properly controlled or refined, and which is sold as reclaimed scrap pig to a producer or a smelter.

* * *

(j) "Ingot" means aluminum as cast to specific composition for remelting.

(k) "Pig" means aluminum of variable composition as produced in an electric reduction furnace.

(l) "Scrap pig" means unrefined aluminum of variable composition as produced in reclamation operation.

* * *

Office of Price Stabilization, Ceiling Price Reg. 54, June 29, 1951

Chapter III—Office of Price Stabilization, Economic Stabilization Agency

CPR 54—ALUMINUM SCRAP AND SECONDARY ALUMINUM INGOT

* * *

STATEMENT OF CONSIDERATIONS

This regulation establishes ceiling prices for aluminum scrap and secondary aluminum ingot.

Aluminum scrap is an important source of metal ultimately utilized in a wide variety of products important to the defense program as well as to the civilian economy. Primary aluminum producers use scrap to blend with their supplies of primary metal. The producers of secondary aluminum ingot, however, depend on scrap as their principal raw material, using primary metal only as a means of obtaining ingot with the desired combination of meals. About twenty-five percent of the total aluminum production in the United States is derived from scrap materials.

The outbreak of hostilities in Korea and the inauguration of our defense program sharply increased the demand for aluminum and upset the price relationships which ordinarily prevail in the industry.

* * *

Sec. 8. *Definitions.* When used in this regulation the term:

* * *

(r) "Scrap" or "scrap materials" means aluminum scrap which is the waste or by-product of any kind of metal working or processing, or which has been discarded on account of obsolescence, failure, or other reason. It also includes sweated pig or ingot.

(s) "Secondary aluminum ingot" means all ingots, alloys, and hardeners containing 50 per cent or more aluminum by weight, and of which 50 percent or more is obtained from scrap materials.

* * *

(v) "Wrecked aircraft" means aluminum scrap (not including engines or engine parts) recovered from the wreckage of aircraft, obsolete aircraft, and from rejected

airframes containing foreign materials after all possible non-aluminum parts have been removed.

* * *

Office of Price Stabilization, Ceiling Price Reg. 54, Revision 1, January 16, 1952

CPR 54—ALUMINUM SCRAP AND SECONDARY ALUMINUM INGOT

* * *

STATEMENT OF CONSIDERATIONS

* * *

Several important changes have been made in the definitions set forth in CPR 54. There has been a great deal of confusion as to whether wrecked aircraft included obsolete aircraft which could still be used for flying purposes. To dispel any such confusion, the definition of wrecked aircraft has been changed to indicate clearly that all aircraft is covered by this regulation except aircraft sold for flying purposes. Some confusion has also existed as to whether certain grades of sweated pig or ingot might be considered a secondary aluminum ingot. It appears that in making sweated pig or ingot, an analysis of the contents is made at random and such analysis may meet the specifications of a steel deoxidizing grade of ingot. This operation, however, is not a controlled metallurgical process, and the resulting material must be processed further before a desired secondary aluminum ingot is obtained. This revision defines secondary aluminum ingot not only in terms of the chemical composition of the ingot but also in terms of the process by which the ingot is made, thus clearly indicating that in order to be classified as a secondary aluminum ingot, the ingot must be made in a metallurgically controlled process.

* * *

Sec. 17. *Definitions.* When used in this regulation the term:

* * *

(s) "Scrap" or "scrap materials" means aluminum scrap which is the waste or by-product of any kind of metal working or processing, or which has been discarded on account of obsolescence, failure, or other reason. It also includes sweated pig or ingot.

(t) "Secondary aluminum ingot" means all ingots, alloys and hardeners containing 50 percent or more aluminum by weight, and of which 25 percent or more is obtained from scrap materials. Such ingot must be produced by means of a metallurgically controlled process to conform to definite specifications as to chemical composition, physical properties, and size or shape.

* * *

(x) "Wrecked aircraft" means the wreckage of aircraft, obsolete aircraft, and rejected airframes when such materials contain aluminum. It does not include aircraft when sold for reuse as aircraft, if the purchaser certifies in writing to the seller that the aircraft is being purchased for this purpose.

* * *

OCT 2 0 1955
HAROLD B. WILLEY, C

IN THE
SUPREME COURT OF THE UNITED STATES

No. 414.

SONKEN-GALAMBA CORPORATION, a Corporation,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

Respondent brought two actions in the United States District Court for the District of Kansas (Tr. 5-9, 12-15) to recover undercharges upon a total of 64 carload shipments of aluminum which had been melted down into the form of ingots, pigs or slabs from their prior shapes as parts of airplanes wrecked in World War II or which had become obsolete since that time and shipped to petitioner over respondent's railroad and connecting railroads. Petitioner paid the aluminum scrap rate upon such shipments and

respondent's suits were to recover the additional amounts due under the aluminum ingot rate.

The provision of the tariff which respondent contended applies to the shipments is as follows:

> "1570—Aluminum: Billets, blooms, ingots, pigs or slabs, see Notes 1 and 2, Items 1575 and 1576, loose (LCL, only if weighing 15 lbs. or over) or in packages.
>
> "1575—Note 1—Ratings apply only on material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished, commercially known as billets, blooms, ingots, pigs or slabs."
> (Tr. 55, 20, Ex. G, 407.)

The provision of the tariff which petitioner contended applies to the shipments is as follows:

> "Scrap, aluminum (See Note 1).
>
> "Note 1—includes only pieces (separate or combined) having value for remelting purposes only."
> (Tr. 56, 20, Ex. G, 407.)

The cases were tried to a jury which found by a special verdict that the shipments were covered by the "aluminum ingot, pig and slab" classification and judgment was thereafter rendered in favor of respondent. The Court of Appeals for the Tenth Circuit affirmed the judgment but held that the cases should not have been submitted to the jury and the trial court should have held as a matter of law that the tariff provision covering ingots, pigs or slabs applied to the shipments involved.

In answer to the present petitioner's contention that respondent was required to, and did not, prove that the aluminum material constituting the shipments was "commercially known" as ingots, pigs or slabs, the Court of

Appeals in its decision held that the language of the aluminum ingot tariff provision by its own language established and affirmed that ingots, pigs and slabs described therein were "commercially known as * * * ingots, pigs, or slabs," and no additional showing was required. The Court of Appeals further held that "even if the tariff provision in question be interpreted as requiring all goods within its purview to be 'commercially known as' ingot, pig or slab, the evidence of record is overwhelming that the goods in controversy were in common business terminology so regarded."

A considerable portion of petitioner's "Statement" is argumentative in nature and that portion will be discussed in our argument.

ARGUMENT.

Petitioner's Petition for a Writ of Certiorari should be promptly denied for the reason that none of the reasons set forth in Rule 19 for the granting of such writs is present here. The decision which petitioner seeks to have reviewed by this Court is one rendered by a Court of Appeals, and of the reasons enumerated in Rule 19 (b) for this Court granting such a writ the only one advanced and relied upon by petitioner is that the decision of the Court of Appeals for the Tenth Circuit is in conflict with decisions of other Courts of Appeals and with the decisions of this Court because the Court of Appeals in this case disregarded "commercial knowledge as a test of identification." We shall show that this contention is not correct for two reasons: (1) Under the tariff classification covering aluminum ingots, pigs or slabs quoted above in our statement of facts, Note 1 thereof itself provides that the material described therein *is* "commercially known as ingots, pigs

or slabs," making evidence and proof of such knowledge unnecessary and improper, and (2) Even if proof of commercial knowledge were necessary, it was supplied and proved by petitioner's own evidence.

The Tariff Classification Covering Aluminum Ingots, Pigs or Slabs Provides and Establishes That the Aluminum Shipments Involved Herein Were Commercially Known As Ingots, Pigs or Slabs.

Petitioner contended in the Court of Appeals and contends now that application of the ingot tariff requires evidence upon the question as to whether the aluminum constituting the shipments involved here was known commercially as ingots, pigs or slabs, and cites several cases in this Court and in other federal courts (involving, however, statutory import duties) where that was held necessary. The Court of Appeals held in the present case that this was not necessary or required because the tariff classification (1570, 1575, Note 1) itself asserted that the ingots, pigs and slabs described in the classification itself were "commercially known" as such; the Court stating that the clause "commercially known as billets, blooms, ingots, pigs or slabs," as it appears in the tariff provision involved here, was itself "an affirmation that ingots, pigs, or slabs of the size and processed in the manner detailed in the schedule are commercially known as ingots, pigs, or slabs," and that the clause was not one of limitation. Thus, the wording of the ingot classification itself does not leave open the question of commercial knowledge or use.

The Court of Appeals in this case had before it a tariff classification the wording of which was different than those involved in any of the cases cited by petitioner and those cases are of no effect whatever here. The statutory import duty provisions in those cases did not contain such a

clause as "commercially known as billets, blooms, ingots, pigs or slabs," or simliar one, *describing* the commodity named in the classification, as here. The decision of the Court of Appeals in this case simply interpreted the tariff provision before it, and none of the cases cited by petitioner nor any other federal court cases are in conflict with the present decision.

We think, as the Court of Appeals did, that the meaning of the ingot tariff involved here is clear and unambiguous. We contend that under the simple and ordinary rules of grammar the clause, "commercially known as billets, blooms, ingots, pigs or slabs" does not in itself constitute a qualification, restriction or limitation but merely is descriptive of what precedes it in the sentence—a parenthetical non-restrictive clause.

The qualification or limitation as to the material covered by the general classification in item 1570 is the part of the sentence in Note 1 reading: "not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished." The clause "commercially known as billets, blooms, ingots, pigs or slabs" merely sets forth that the material designated and limited by the preceding clause is "commercially known" as such. This is easily demonstrated. If the clause "commercially known as billets, blooms, ingots, pigs or slabs" were intended to be a qualification, restriction or limitation, then it would not have been necessary to put in the intervening clause but simply to make Note 1 read as follows: "Ratings apply only on material commercially known as billets, blooms, ingots, pigs or slabs." If that had been done then, perhaps, the test to be applied as to each shipment would be whether the material was so commercially known. However, the note provides its own test—the rating shall apply only to material "not

further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished." The very purpose of the last clause in the sentence in the note is to establish, or at least recognize, that the kind of material described in the clause preceding it is commercially known as billets, blooms, ingots, pigs or slabs. There is a practical reason for this: the provision by a note of a simple physical description defining for the benefit of all parties affected what are aluminum billets, blooms, ingots, pigs or slabs under the ingot tariff provision and to establish definitely that other material further finished than as described could not be shipped under the ingot rate. Note 1 spells out the physical description for the benefit of all parties. If petitioner's interpretation were correct, how would a railroad know whether or not aluminum material offered for shipment in the form of ingots, pigs or slabs was ingots, pigs or slabs if it were required to get evidence or opinions in each instance from the aluminum industry or someone else as to whether the shipment offered was "commercially known as" an ingot, pig or slab?

The theory of petitioner in these cases and the testimony of its witnesses was that in order for an ingot, pig or slab to be commercially known as such it must have certain definite chemical specifications. How would it be possible or practical from a transportation standpoint to provide such a test? Obviously, there was no intention that the railroad be required to make chemical analyses of shipments and all it is required to do is see if the commodity is aluminum in the form of an ingot, pig or slab as described in Note 1. The chemical content of every shipment could not be tested, and the tariff did not intend that it be. The purpose of the note was to establish or recognize what were commercially known as billets, blooms, ingots, pigs or slabs, not to require further tests.

The Interstate Commerce Commission has passed upon this tariff provision in four cases (which will be later discussed) where shipments of commodities identical to the ones involved in these cases were involved, and the Commission held in each case that the commodity was an ingot and should be classified and rated as such under the same tariff provision involved here covering billets, blooms, ingots, pigs or slabs. In not one of those cases did the Commission even suggest (and apparently the aluminum industry complainants did not suggest or contend) that there must be proof that the commodity identical to that involved here was commercially known as an ingot, and this is a good indication that the aluminum industry itself does not agree with petitioner's interpretation and contention. And petitioner has cited no authority, and we are confident it can find none, which holds that before aluminum ingots, pigs or slabs shall be classified and rated as such under this tariff provision it must first be proved that they are commercially known as such. Certainly, the evidence in these cases, including that of petitioner, does show that the aluminum ingots, pigs and slabs which were the subject of these shipments were "material not further finished than hot rolled, rough hot extruded, rough hot pressed or rough hot hammered and not smooth, nor surface finished," and petitioner does not claim they were not.

We believe it clear that the last clause in Note 1 to the tariff provision covering ingots, pigs and slabs is merely an affirmation, as the Court of Appeals found, that the material described in the preceding portion of the sentence is such as is commercially known as ingots, pigs or slabs and does not constitute an additional qualification, restriction or limitation. Thus, there was no requirement that respondent show by evidence that the aluminum ingots, pigs and slabs involved herein were commercially known as

such, and petitioner's evidence in that regard was immaterial.

The construction of a railroad tariff presents a question of law (*Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285, 291; *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393; *Boone* v. *United States*, 109 F. 2d 560, 562), and this is recognized by petitioner, for on page 15 of its brief it quotes from the case of *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778, to that effect. The Court of Appeals interpreted the tariff involved here and that interpretation is not in conflict with any decision interpreting a similar or other tariff provision.

Even If Commercial Knowledge Were Required to Be Shown, Petitioner's Own Evidence Showed Conclusively That the Aluminum Involved Was Commercially Known As Ingots, Pigs, or Slabs.

The Court of Appeals held that even if the ingot tariff provision could be interpreted as requiring a showing that the aluminum described in it was "commercially known as" ingots, pigs or slabs, the evidence in the case is overwhelming that the aluminum in controversy was so regarded, and this was shown by petitioner's own evidence.

The very commercial transactions involving the commodities constituting the shipments in these cases showed that the subjects of those shipments were treated, designated, named and considered by all the parties, including petitioner, as ingots, pigs or slabs. We shall not take the space to point out the designations by the shippers, the petitioner, and others of all of the shipments but they were referred to and described during the testimony of Herman Galamba (Tr. 303-333) and are shown in petitioner's exhibits (Tr. 413-26). Some of the descriptions and designations, however, are as follows:

Shipment 1, Case No. 5016, bill of lading, "aluminum, scrap, secondary, ingots" (Tr. 303). Shipment 5, No. 5016, invoice, "aluminum scrap in slab form" (Tr. 304). Shipment 6, No. 5016, letter, "aluminum ingot" and "ingot" (Tr. 304-5). Shipment 8, letter, "aluminum ingot," letter, "rerun aluminum ingot," contract, "rerun aluminum ingot in slabs," invoice, "rerun aluminum slabs" (Tr. 305). Shipments 10 and 11, No. 5016, invoice and sales confirmation, "remelt duraluminum ingots," ocean bill of lading, "remelt aluminum ingots," memorandum from petitioner, "rerun aluminum ingot" (Tr. 305-6). Shipment 12, No. 5016, bill of lading, analysis certificate and letter of credit, "remelted aluminum ingots" (Tr. 307). Shipment 13, No. 5016, bill of lading and invoice, "rerun aluminum ingots" (Tr. 308). Shipments 14 and 15, No. 5016, affidavit of petitioner, "aluminum alloy ingots," letter, "aluminum alloy ingots" (Tr. 308-9). Shipment 16, No. 5016, contract, "Japanese remelted aluminum," chemical analysis, "ingots" (Tr. 309). Shipment 19, No. 5016, invoice, "ingots," contract, "remelted aluminum alloy ingots" (Tr. 311-12). Shipment 21, No. 5016, contract, "remelted aluminum ingots," invoice, "ingots," "half ingots" and "remelted aluminum ingots," letter from petitioner, "ingot" and "aluminum ingot," analysis, "ingots" (Tr. 312-13). Shipment 22, No. 5016, contract and invoice, "remelted aluminum alloy ingots," letter from petitioner, "ingots" and "square slabs" (Tr. 314). Shipment 26, No. 5016, contract, "rerun aluminum ingot" (Tr. 316). Shipment 30, No. 5016, invoice, "remelted aluminum ingots" and "ingots" (Tr. 317). Shipment 3, Case No. 5017, contract, "secondary aluminum," letter, "ingots, remelted aluminum," analysis, "slabs and ingots" (Tr. 318). Shipments 6, 7 and 8, No. 5017, contract, "remelted aluminum ingots," letter, "ingots" and "round top ingots" (Tr. 320). Shipment 12, No. 5017, invoice, "alumi-

num alloy ingots" (Tr. 322). Shipment 13, No. 5017, invoice, "ingots aluminum scrap," contract, "aluminum alloy ingots," letter, "remelted aluminum ingots" (Tr. 322). Shipment 14, No. 5017, letter, "aluminum ingots," letter from petitioner, "notched ingots" (Tr. 323). Shipment 15, No. 5017, contract, "rerun aluminum ingots," invoice, "aluminum ingots" (Tr. 324). Shipment 18, No. 5017, contract and invoice, "remelted aluminum alloy ingots," certificate and letter, "ingots" (Tr. 325-7). Shipment 27, No. 5017, contract and invoice, "rerun aluminum ingots," letter from petitioner, "slabs" (Tr. 329). Shipment 30, No. 5017, invoice, "rerun ingot," contract, "rerun aluminum ingots" (Tr. 331). Shipments 34, 35 and 36, No. 5017, bill of lading, "aluminum, pigs (ingots)" (Tr. 333).

Many of the various terms were used interchangeably in the same transaction.

These contracts, invoices, bills of lading, analyses and letters executed in connection with the transactions covering the purchase and shipment of the ingots, pigs and slabs constituting the shipments involved herein show clearly that in these commercial transactions between corporations representing a sizeable portion of the entire aluminum industry and representing the aluminum scrap industry (an entire industry in itself) the commodity was described in various ways as ingots, pigs or slabs and that these terms were understood by all as describing the commodity being sold and shipped. If there were a requirement it be shown by evidence that the ingots, pigs or slabs were commercially known as such (and the Court of Appeals held there was not), this evidence certainly showed that the ones involved in the shipments in these cases were known as such and were considered, referred to, recognized and treated as ingots, pigs or slabs by petitioner itself.

Petitioner also contends that since there is also a separate tariff classification for scrap aluminum the aluminum shipments involved here could fall within that tariff as well as the ingot tariff. It then argues that an ambiguity is thereby created and the scrap tariff, calling for the lower rate, must be applied. That rule is correct, of course, where there is an ambiguity, but there is no ambiguity here. The ingot tariff applies to aluminum ingots, pigs and slabs, in which form the aluminum here was shipped. After being melted into such form the aluminum was no longer scrap for transportation purposes. Petitioner concedes and contends that secondary aluminum ingots take the ingot rate, the same as do primary aluminum ingots, yet secondary ingots only have to have 50 per cent or more aluminum content (Tr. 237, 340). The evidence shows that the ingots made from scrap involved here were by contract usually required to and did contain over 90 per cent aluminum and always over 80 per cent aluminum (Tr. 304, 305, 306, 307, 309, 310, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 325, 328). There can, therefore, be no doubt that the commodity shipped was aluminum and that it was in the form of ingots, pigs or slabs. Whether the ingots, pigs or slabs had been scrap aluminum before it was made into ingots, pigs and slabs is immaterial. When it was cast into the form of aluminum ingots, pigs or slabs it became subject to the tariff covering that commodity. Certainly, there was no ambiguity.

The Interstate Commerce Commission has always held that the character of a shipment from a transportation standpoint and not the use to which it will be put governs its tariff classification.

In *Brown & Brown* v. *B. & M. R. R.*, 266 I. C. C. 310, it was said:

> "The Commission consistently has found that it is the character of an article from a transportation standpoint, and not the use to which it shall be put that determines the rate or rating applicable" (p. 312).

In *Paducah Hosiery Mills* v. *P. R. R.*, 171 I. C. C. 61, it was said:

> "Differences in rates must depend on some physical difference and not merely upon a difference in the use to which a commodity is put" (p. 62).

And the Interstate Commerce Commission specifically applied the transportation standpoint rule in the recent aluminum ingot decisions which we have hereinbefore referred to and which we shall later discuss herein. *Apex Smelting Co.* v. *New York Central R. Co.*, 288 I. C. C. 78; *Apex Smelting Co.* v. *New York Central R. Co.*, 292 I. C. C. 17; *American Smelting & Refining Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383.

See, also, *National Petroleum Assn.* v. *A., T. & S. F. Ry.*, 37 I. C. C. 287; *Zimmerman-Wells-Brown Co.* v. *Director General*, 122 I. C. C. 199; *Royster Guano Co.* v. *A. C. C. R. R.*, 156 I. C. C. 522; *American Tank Co.* v. *K. C., M. & O. Ry.*, 167 I. C. C. 508.

As shown, the decision of the Court of Appeals is in no way in conflict with other decisions either of this Court or of other Courts of Appeals and there is no basis for certiorari being granted in this case.

The Identical Issue Involved in These Cases Has Been Determined Adversely to Petitioner by the Interstate Commerce Commission.

Not only, as we have pointed out, are there no decisions of this Court or of the Courts of Appeals which conflict with the decision in these cases, but there are four

recent decisions of the Interstate Commerce Commission involving *identical* essential facts which hold that the aluminum ingot tariff classification involved here and not the aluminum scrap tariff classification applies to shipments of scrap aluminum melted into the form of ingots, pigs and slabs, such as these. *Esperado Mining Co.* v. *Atchison, T. & S. F. Ry. Co.*, 278 I. C. C. 183; *Samuel Greenfield Co., Inc.*, v. *New York Central R. Co.*, 288 I. C. C. 59; *Apex Smelting Co.* v. *New York Central R. Co.*, 288 I. C. C. 78; 292 I. C. C. 17; *American Smelting & Refining Co.* v. *Grand Trunk W. R. Co.*, 288 I. C. C. 383. Because space will not permit we shall not quote from those decisions—since their similarity and applicability to our case is so complete and patent that extensive quotation would be required—but an examination of those decisions will show that they are completely decisive and determinative of the question of the classification to be applied in the present case; as they were found to be by the Court of Appeals in its opinion.

There are also other earlier decisions of the Interstate Commerce Commission which hold that the ingot or pig rate and not the scrap rate applied to the shipments at issue in those cases, which consisted of scrap metal melted into the form of ingots and pigs. *Federated Metals Corp.* v. *St. Louis-S. F. Ry. Co.*, 171 I. C. C. 78; *Marx & Sons* v. *Louisiana Ry. & N. Co.*, 151 I. C. C. 298; *Berman Bros. Iron & Metal Co.* v. *Alabama G. S. R. Co.*, 263 I. C. C. 678.

There is also a state court decision, *Yazoo & M. V. R. Co.* v. *A. Marx & Sons*, 17 La. App. 172, 135 So. 64, from which the Court of Appeals quoted in its opinion, which holds that scrap lead melted into the form of pigs should be classified as pig lead and not as scrap lead under the tariff in effect at that time.

Petitioner suggests that Interstate Commerce Commission decisions are not binding on the courts. While they

are not absolutely conclusive, all of the authorities are to the effect that such decisions are very highly persuasive because of the special training, knowledge and experience of the members of the Commission and like bodies with respect to the subject involved. 11 Am. Jur., Commerce, Sec. 153; 15 C. J. S., Commerce, Sec. 145; *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454; *Virginia R. Co.* v. *United States*, 272 U. S. 658, 665; *United States* v. *Pennsylvania R. Co.*, 21 F. 2d 579; *Empire Refining Co.* v. *Davis*, 6 F. 2d 305; *Updike Grain Corporation* v. *St. Louis & S. F. Ry. Co.*, 52 F. 2d 94; *Atchison, T. & S. F. R. Co.* v. *Union Wire Rope Corporation*, 1 F. Supp. 399; *Interstate Commerce Comm.* v. *A. W. Stickle & Co.*, 41 F. Supp. 268; *Koppers Gas & Coke Co.* v. *United States*, 11 F. Supp. 467.

In *Crancer* v. *Lowden*, 315 U. S. 631, this court held that it was proper to admit in evidence a prior decision of the Interstate Commerce Commission determining "virtually the same question" that was before the court.

In *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, this court held with respect to an order of the Commission in a proceeding involving other parties that the finding in that proceeding "was general in its operation and inured to the benefit of every person that had been obliged to pay" the rate involved; that "otherwise those who filed the complaint * * * would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure" (p. 665). That ruling in that case was followed and applied in *Corray* v. *Baltimore & O. R. Co.*, 2 F. Supp. 829.

As pointed out, the Interstate Commerce Commission has consistently held that material identical to that involved in this present action comes within the ingot classification. Other shippers have paid on that basis and other railroads have collected on that basis. Those decisions should be followed, as they were by the Court of Appeals in this case, in the interest of uniformity, if for no other reason. If they are not, then a preference would be created in favor of petitioner here as against the shippers involved in those proceedings.

Directives and Orders of Other Governmental Boards Are Immaterial.

Petitioner contends that directives and orders of the Office of Price Stabilization and of the National Production Authority defining aluminum scrap and aluminum ingots are of some significance in this case. Although they are set out verbatim in Appendix B to petitioner's petition, they are not involved as an issue in the case within the meaning of Rule 40, 1 (c), as we understand that rule, but were merely part of petitioner's evidence on the question of commercial knowledge. Those orders and directives were not only not material because the question of commercial use and knowledge was not properly an issue in the case, but even if there were such an issue those orders and directives were also not material because they did not deal with the subject of transportation, such as is involved here. The Interstate Commerce Commission is the governmental body having the exclusive jurisdiction to determine the classification of commodities for transportation purposes and, as pointed out, its decisions hold that the material constituting the shipments involved here is ingots, pigs and slabs.

CONCLUSION.

It is clear that the decision of the Court of Appeals for the Tenth Circuit is not in conflict with any decisions of this Court or with the decisions of any other Court of Appeals. The decision, on the other hand, is in accordance with all of the decisions of the Interstate Commerce Commission in cases involving shipments identical in character to those involved here. Since a specific tariff classification, different in language from other tariff classifications and specifically covering only shipments of the character involved herein, is involved, it does not affect in any way other decisions of this or other federal courts which have passed upon and interpreted other tariff provisions or classifications. Therefore, there is no basis for petitioner's contention that the decision in this case leaves industrial shippers in a state of uncertainty, whether they be domestic shippers or importers of foreign goods. The Court of Appeals in this case has made no departure from the rules or holdings of any prior decisions of any court.

It is apparent, therefore, that no grounds for the granting of petitioner's Petition for a Writ of Certiorari have been shown or exist. The decision of the Court of Appeals was correct and the petition should be denied.

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REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

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REPLY OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI.

To mention the obvious, respondent has not met the issue raised by this petitioner head-on.

Although respondent undertakes to discuss fleetingly the significance of isolated fragments of evidence, thereby overlooking the principal function of a certiorari proceeding, the primary question before this Court remains one of law. Simply put, is or is not "commercial knowledge" of a commodity the test to be applied in construing and applying a railroad tariff? We are confident that (1) such is the test, and (2) the Court of Appeals for the Tenth Circuit, in refusing to apply it, is in conflict with the many decisions of this Court and other federal appellate courts cited in the instant petition.

On page 7 of its answer, respondent states:

> "And petitioner has cited no authority, and we are confident it can find none, which holds that before aluminum ingots, pigs or slabs shall be classified and rated as such under this tariff provision it must first be proved that they are commercially known as such."

May we reply that, "if the tariff is addressed to a special class of shippers and uses words which have a particular or customary import among such class of shippers, that meaning should be given to such words, for that is how they reasonably would understand them." *Union Wire Rope Corp.* v. *A., T. & S. F. Ry. Co.*, (C. C. A. 8, 1933) 66 F. 2d 965, 967. Nor can respondent dismiss the compelling philosophy of the many decisions of this Court (Petition, pp. 10-12), on the mere ground that they involve "statutory import duties" and are, therefore, inapplicable.

Respondent, after first discarding commercial knowledge as the test of identification, proceeds to argue that Note 1 of its ingot tariff should be construed to mean that the material described therein is "commercially known" as ingot, making further evidence of such knowledge improper and inadmissible (Answer brief, p. 3). If this be true, the test of commercial knowledge would be rendered totally meaningless. Neither this respondent nor any carrier, by its own peremptory fiat, can dictate another's understanding. In short, commercial knowledge is exactly what the term implies. To ascertain it obviously it is not the understanding or intention of the carrier to which we must look, but rather to the understanding of the class of shippers dealing in the particular commodity.

On page 6 of its answer respondent in effect argues if ingot, to be commercially known as such, requires definite chemical specifications, such a test would be impractical "from a transportation standpoint." Such argument further

demonstrates the inherent weakness of respondent's position, and in fact concedes the point. If commercial knowledge is the test, and if that knowledge requires a definite chemical composition, it would seem incredible that a commodity should be considered commercially known as ingot in the absence of such a definite chemical composition. Furthermore, this very tariff provision permits transportation in packages. How does the carrier know what is actually in the package? Many subjects of commerce are not precisely identifiable from inspection or appearance. The carrier's protection is in the highly penal provision of the Transportation Act, which prohibits mis-billing. Lastly, the tariff provision in specific terms establishes commercial identity as the criterion. So commercial identity, in this case, is the identity involved even "from a transportation standpoint."

In short respondent denies, as does the Court below, that commercial knowledge is the appropriate test. Yet, through perplexing gymnastics, it urges that the commercial identity of a commodity can be ascertained without examining into the understanding of the very industry dealing therein! Railroad convenience thus neatly eclipses industry understanding as the "test" of commercial knowledge. We do not believe that this Court will permit the opinion below to discard the well established rule of commercial knowledge while at the same time, in order to foreclose review on certiorari, to manipulate the principle in such a way as to emasculate its efficacy.

Petitioner concedes that a number of recent I. C. C. cases have ill-advisedly espoused the views set forth by respondent. Not only are these cases not controlling, but, like the decision below, they are in conflict with the previous rulings of this and other federal courts. We do not think

that the I. C. C., or for that matter any governmental agency, will be permitted to justify such manifest error under a cloak of administrative expertise. Perhaps this Court will welcome this opportunity so to find.

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